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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re JONATHAN P., a Person Coming Under
the Juvenile Court Law.

TULARE COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

ERIC P. et al.,

Defendants and Appellants.

F077445

(Super. Ct. No. JJV060513C)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Tulare County. Juliet L. Boccone,
Judge.

Monica Voglemann, under appointment by the Court of Appeal, for Defendant
and Appellant, Eric P.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and
Appellant, Sonya H.

Deanne H. Peterson, County Counsel, and John A. Rozum and Amy-Marie Costa,
Deputy County Counsel, for Plaintiff and Respondent.

* Before Peña, Acting P.J., Smith, J. and Meehan, J.

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INTRODUCTION

A Welfare and Institutions Code¹ section 300 petition was filed on behalf of then four-year-old Jonathan P. (Jonathan) on July 21, 2017, by the Tulare County Health and Human Services Agency (agency). Ultimately, reunification services were denied to both father and mother and a section 366.26 permanent plan hearing was set. Father filed a section 388 petition seeking reunification services, which was denied. The trial court terminated both parents' parental rights at the section 366.26 hearing.

Father appeals contending the juvenile court abused its discretion in denying his section 388 petition. Mother appeals contending the juvenile court erred by not finding the beneficial parent-child relationship exception applied to preclude termination of parental rights. Both parents join in the other's argument on appeal. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Mother's parental rights to two of Jonathan's half-siblings previously were terminated in 2009. That juvenile dependency decision was the subject of our unpublished opinion in case No. F058356, of which we take judicial notice.

Case No. F058356

The facts of the dependency in case No. F058356 are taken from our opinion in that case. In 2006, the juvenile court ordered mother into a drug rehabilitation program as part of juvenile dependency services to reunify mother with then two-year-old C.H. She had been under the influence while caring for the child in January 2006. Mother did complete the drug rehabilitation program and the court returned C.H. to her custody, subject to family maintenance services, in September 2006. Mother gave birth to her daughter, H.H. soon thereafter.

¹ References to code sections are to the Welfare and Institutions Code.

Mother tested positive for methamphetamine once again in May 2007. The next month, she attempted to falsify her urine sample in an effort to trick the drug testing facility. She did so for fear her own urine would test positive for illegal substances. Nevertheless, in January 2008, the court terminated jurisdiction over C.H. and awarded mother sole custody.

Mother, however, showed continued resistance to her drug treatment. She was arrested in July 2008, for possession of 49 hypodermic needles and drug paraphernalia found in the residence she shared with the children. Mother admitted a 10-year history of using methamphetamine. She reportedly last used within days before her arrest. Around the same time, adults twice found five-year-old C.H. out in the neighborhood and unsupervised. Mother was under the influence of methamphetamine at least once more in August 2008, when she was again arrested, and the children detained.

Dependency jurisdiction over then five-year-old C.H. and his two-year-old sister H.H. was exercised and the children were removed from parental custody in September 2008. Mother, who has an extensive substance abuse history, was under the influence of controlled substances, specifically methamphetamine, in August 2008. She also used in the children's presence. Her son C.H. could describe how and where mother injected herself with drugs. Her substance abuse placed the children at a continuing risk of suffering serious physical harm or illness due to their young ages and inability to protect themselves. (§ 300, subd. (b).)

At the dispositional hearing, the juvenile court also denied both parents reunification services. The court did so in mother's case, having found she had a history of extensive, abusive, and chronic use of drugs or alcohol and resisted prior court-ordered treatment for this problem during the three-year period immediately prior to the filing of the petition. (§ 361.5, subd. (b)(13).)

In our unpublished opinion in case No. F058356, we affirmed the order terminating mother's parental rights to C.H. and H.H.

Current Dependency

On June 18, 2017, the agency received a referral alleging drug use by mother and domestic violence between mother and father. On July 13, 2017, a social worker made an unannounced visit to mother's home and found father at home with Jonathan. Father claimed he did not live in the home, but was there to provide childcare. Father denied mother used drugs, denied he used drugs, and denied any domestic violence. He admitted struggling with alcohol use.

The social worker spoke with Jonathan while father was present. Jonathan stated his mother works and his father looks after him. Jonathan also said his mother and father yell and hit.

The next day, the social worker met with mother at her home. Mother claimed she completed an inpatient drug treatment program and had been "clean" since September 17, 2016. While she was in the drug treatment program, Jonathan lived with his maternal grandparents.² Mother admitted there was a history of domestic violence with father, but claimed the last incident was in August 2016.

Mother claimed father was not the same person as before. Father did not live in the home with mother but provided childcare and left the home each night by 10:00 p.m. Mother indicated father was not reliable because he was still drinking, so she also used a woman she had met at a shelter as a care provider.

The social worker spoke with Jonathan on July 14, 2017. Jonathan stated mother gives herself shots in the stomach; mother denied any drug use. Mother agreed to be tested and tested positive for methamphetamine. When the social worker spoke with

² Maternal grandfather and maternal step-grandmother are referred to as maternal grandparents.

mother about the positive drug test, mother claimed she used drugs because of the stress of being a single parent, working full time, and not receiving help from father. Mother denied using drugs in front of Jonathan but admitted using drugs with father.

At a team meeting on July 20, 2017, father did not attend. Mother reported being afraid of father. It was decided to offer family maintenance services to mother. Mother agreed to voluntary placement of Jonathan with the maternal grandparents until mother could obtain a restraining order against father. Mother also agreed to refrain from using drugs or alcohol.

Mother described for the social worker the domestic violence engaged in by father, including punching mother in the face. Mother told the social worker father drinks daily and when he consumes beer he was “okay,” but after consuming liquor he is the “devil.” Mother stated she was afraid of father “and could not imagine how scared the child was.”

On July 21, 2017, the maternal grandparents called the social worker to report father showed up at mother’s house and forced mother to drive with him to the maternal grandparents’ home to retrieve Jonathan. Mother went into the home and called law enforcement. At the time, mother had injuries to her right elbow, upper left arm, and hands from an altercation with father. The police provided mother with a temporary protective order.

Mother told the social worker father arrived at her home under the influence of alcohol. Mother admitted she and father used methamphetamine together on July 13, 2017. The social worker spoke with father at the pretrial detention facility on July 21, 2017. Father denied any current substance abuse, denied domestic violence with mother, denied ever physically harming mother, and denied mother used drugs.

The agency filed a non-detained section 300 petition on July 21, 2017, removing Jonathan from father and providing family maintenance services to mother. Jonathan was detained from father but allowed to remain in mother’s custody under a safety plan.

Mother reported using methamphetamine on July 22, 2017, because she was “stressed” out. On July 24, 2017, the social worker spoke with the maternal step-grandmother, who indicated mother admitted to tampering with drug tests in her prior dependency case and in the current case.

The social worker met with father on July 28, 2017; father smelled of alcohol and appeared to have an injection site on his right wrist.

Ultimately, a third amended section 300 petition was filed July 26, 2017. The third amended petition alleged Jonathan was at risk of substantial harm because of mother’s and father’s substance abuse; mother and father failed to adequately protect Jonathan and exposed him to domestic violence; mother failed to provide adequate medical care for Jonathan; and mother’s parental rights previously had been terminated to two other children because of substance abuse and neglect.

Reports filed for the jurisdiction and disposition hearing reflected Jonathan making statements like, “my dad tried to kill my mom.” Father had an extensive criminal history, primarily for possession of controlled substances, public intoxication, and theft. The agency initially recommended reunification services be denied mother, because of the previous termination of parental rights to two children and her chronic substance abuse, but provided to father.

Mother reported not following through to obtain a restraining order against father because he was her “friend.” Mother reported she started using methamphetamine when she was 17 years old; mother was then a few days away from turning 40 years old. Mother had failed to obtain treatment for Jonathan for his asthma.

The social worker noted that mother previously had been provided substance abuse services and treatment, but relapsed, resulting in termination of her parental rights to two other children.

Father did not attend his case plan meeting; failed to appear for drug tests; and failed to appear for an assessment. Father had not made himself available for visits with

Jonathan. Father gave the agency an address that was his stepmother's residence, but she had no knowledge of his whereabouts. At the initial jurisdiction and disposition hearing, father appeared with counsel and requested a continuance.

The agency filed an addendum report on September 14, 2017, recommending father be denied reunification services pursuant to section 361.5, subdivision (b)(13), chronic abuse of alcohol or drugs. Father had been ordered by a court to participate in a 90-day residential drug and alcohol treatment program in 2013. Father failed to complete the program and continued to use drugs and alcohol. Mother reported that father blacks out when he drinks and often becomes violent. Jonathan was aware of father's violence.

In the addendum report, the agency recommended reunification services be denied to both mother and father.

On September 18, 2017, the juvenile court sustained multiple allegations of the third amended petition. Disposition was continued.

An addendum report prepared for the disposition hearing stated the maternal grandparents had been approved for placement of Jonathan.

Father claimed to have enrolled in an outpatient treatment program, however, father was drug tested and tested positive for marijuana. Father was volatile with the social worker, minimized his domestic violence, and minimized his substance abuse.

Mother called the social worker to state she wanted to visit with Jonathan at the same time as father. Mother voluntarily reduced her visitation with Jonathan in order have the same schedule as father.

At the disposition hearing, mother testified she had not started domestic violence prevention classes. Mother testified father was an "awesome" support for her and she planned to co-parent Jonathan with father. Father did not testify.

In denying reunification services to both parents and setting a section 366.26 permanent plan hearing, the juvenile court stated:

“Having reviewed all the reports and the history, I do hope the parents are going to get clean and sober and they will turn their lives around, but Jonathan can’t wait for that to happen. In order to be a parent, you need to be there for more than two or three years at a time, which is the maximum period of sobriety that I’ve heard in the testimony.”

The section 366.26 report recommended termination of parental rights and a permanent plan of adoption with the maternal grandparents for Jonathan. Jonathan was well-adjusted in the maternal grandparents’ home, where he had been placed, and the maternal grandparents were committed to adopting him. Jonathan was thriving and exhibited a strong emotional attachment to his maternal grandparents. The parents requested a contested section 366.26 hearing.

On February 16, 2018, mother filed a section 388 petition. The agency filed opposition to the section 388 petition. At a hearing on March 5, 2018, mother testified she was enrolled in another rehabilitation program. Mother acknowledged she had been in programs before to address her substance abuse, but had relapsed. In addition to the program to address drug and alcohol abuse, mother had enrolled in a domestic violence prevention program. Mother was still in a relationship with father and considered him her “main support.” Mother was visiting Jonathan once a week. Mother felt that with support from her “awesome parent partner,” father, and others, she would not lose parental rights to Jonathan as she had two other children.

In cross-examination, mother admitted going through parenting classes and substance abuse classes before losing parental rights to her two older children. Mother was living with father and had not yet completed her current substance abuse program or the domestic violence prevention program. Mother acknowledged that father had beaten her on “several occasions” in the past and domestic violence incidents occurred when Jonathan was in the house. Mother acknowledged being in substance abuse programs in 2016 but relapsing after seven months.

Mother's section 388 petition was denied. On April 13, 2018, father filed a section 388 petition seeking reunification services.

Father claimed he had completed an in-patient substance abuse program the day before the petition was filed; provided attendance slips for Alcoholics Anonymous (AA) meetings, which ended in December 2017; and had enrolled in domestic violence and parenting classes. However, father had not satisfactorily completed programs. He had been discharged from the in-patient treatment program for aggressive behavior toward staff; was unsatisfactorily discharged from another program because of excessive absences; and attended only three parenting classes.

The agency opposed father's section 388 petition. The CASA office filed a report noting father's inappropriate behavior toward CASA staff.

In denying father's section 388 petition at the April 30, 2018 hearing, the juvenile court noted that reports were consistent that father engaged in aggressive and demanding behavior. Father had been "in and out of drug programs" and had not completed his domestic violence program. The juvenile court found there was not a change of circumstances and granting the petition would not be in Jonathan's best interests.

After denying father's section 388 petition, the juvenile court proceeded to conduct the section 366.26 hearing. Mother testified she was concerned about Jonathan's mental health because his favorite color was black and not blue. Mother wanted Jonathan removed from the maternal grandparents and in a different placement. Mother felt she was bonded with Jonathan and it would be detrimental for the child if her parental rights were terminated. Mother felt she could provide Jonathan "stability."

Counsel for Jonathan argued that while Jonathan was in the custody of his parents, both parents used methamphetamine, were in and out of drug treatment programs, and engaged in domestic violence. Counsel opined that during the time Jonathan lived with these parents, it was "chaotic, frightening, and scary." Counsel argued that Jonathan's

best interests were in being provided safety, security, and stability, and Jonathan was thriving in his placement with the maternal grandparents.

In terminating parental rights, the juvenile court found the “parents are trying to make a last ditch effort, and I understand and appreciate that, but I have to legally consider what’s best for Jonathan.” After noting the domestic violence between the parents and their history of substance abuse, the juvenile court terminated parental rights and set a permanent plan of adoption.

On May 2, 2018, father filed a notice of intent to file a writ petition. By order filed May 10, 2018, this court deemed father’s notice of intent to be a notice of appeal. Mother filed a notice of appeal on May 14, 2018.

DISCUSSION

Father’s brief contends the juvenile court abused its discretion when it denied his section 388 petition. Mother also joins in father’s argument. Mother contends she had a beneficial relationship with Jonathan and the juvenile court abused its discretion in terminating her parental rights. Father also joins in the issue raised by mother in her opening brief.

I. Section 388 Petition

A petition to modify a juvenile court order under section 388 must allege facts showing new evidence or changed circumstances exist, and that changing the order will serve the child’s best interests. (§ 388, subd. (a); *In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.) We review the denial of a section 388 petition after an evidentiary hearing for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. (*Id.* at pp. 318, 319.) Where there is conflicting evidence, we reverse only if the evidence compels a finding for the appellant as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1529.)

A parent may petition the court for such a modification on grounds of change of circumstances or new evidence. (§ 388, subd. (a).) The parent, however, must also establish by clear and convincing evidence that the proposed change would promote the best interests of the child. (§ 388, subd. (b); Cal. Rules of Court, rule 5.570(h)(1)(C).)

The best interests of the child are of paramount consideration when, as here, a section 388 petition is brought after reunification services have been terminated. (See *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In assessing the best interests of the child at this juncture, the juvenile court's focus is on the needs of the child for permanence and stability rather than the parent's interests in reunification. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

The "escape mechanism" provided by section 388 after reunification efforts have ceased is only available when a parent has completed a reformation before parental rights have been terminated. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) This is because, if a parent's circumstances have not changed sufficiently to permit placement of the child with that parent, reopening reunification "does not promote stability for the child or the child's best interests" when the child is otherwise adoptable. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) In assessing whether to grant the section 388 petition, the juvenile court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

Without diminishing father's efforts to address his drug and alcohol abuse, father failed to demonstrate that circumstances had changed. At most, his section 388 petition demonstrated that father was engaged in the effort of changing, however, father had not satisfactorily completed programs. He had been discharged from an in-patient treatment

program for aggressive behavior toward staff; was unsatisfactorily discharged from another program because of excessive absences; and attended only three parenting classes. Assuming arguendo the allegations in father's petition sufficiently showed his circumstances were changing, this showing was insufficient to require the court to change its earlier orders. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 49.)

Father's efforts at sobriety were too recent to establish that father's circumstances had changed and granting the section 388 petition was in Jonathan's best interests. (See *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [parents with extensive drug use history did not show changed circumstances where rehabilitation efforts were only three months old at time of § 366.26 hearing]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423 [seven months' sobriety does not constitute changed circumstance where parent has history of periods of sobriety and relapse]; *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform."].)

The juvenile court did not abuse its discretion in finding father's section 388 petition failed to establish a genuine change in circumstances meriting a consideration of providing reunification services or placing Jonathan with him. If a parent's circumstances have not changed sufficiently to permit placement of the child with that parent, reopening reunification "does not promote stability for the child or the child's best interests" when the child is otherwise adoptable. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

As the Supreme Court explained in *Stephanie M.*, *supra*, 7 Cal.4th 295, by the time a child's dependency has reached the permanency planning stage, a parent's interest in the care, custody, and companionship of the child is no longer paramount. Rather, the focus shifts to the child's needs for permanency and stability, and, in fact, there is a rebuttable presumption that continued out-of-home care is in the best interests of the child. A court hearing a modification petition at this stage of the proceedings must

recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. (*Stephanie M.*, *supra*, at p. 317.)

Here, father did not introduce any evidence, let alone establish by clear and convincing evidence, that Jonathan's need for permanency and stability would be advanced by ordering reunification services with father. Consequently, the evidence does not establish that the juvenile court abused its discretion in denying father's section 388 petition and there is no basis for reversal. (*In re I.W.*, *supra*, 180 Cal.App.4th at pp. 1527-1529.)

Father also argues on appeal that if this court reverses the denial of his section 388 petition, we must also reverse the order terminating his parental rights. Because we are not reversing the denial of father's section 388 petition, and he makes no further argument as to why his parental rights should not be terminated, we need not address this contention.

II. Parent-child Benefit Exception

Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability. If the child is likely to be adopted, adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding termination of parental rights would be detrimental to the child. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

Although section 366.26, subdivision (c)(1) acknowledges termination may be detrimental under specifically designated circumstances, a finding of no detriment is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347.) It is the parent's burden to show termination would be detrimental under one of the exceptions. There is a strong preference for adoption. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) When a juvenile court rejects a detriment

claim and terminates parental rights, the appellate issue is whether the juvenile court abused its discretion. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

For the section 366.26, subdivision (c)(1)(B)(i) exception to apply, known as the beneficial relationship exception, the relationship between parent and child must promote the well-being of the child to such a degree that it outweighs the well-being of the child in a permanent home with adoptive parents. The juvenile court balances the strength and quality of the natural parent-child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent-child relationship would deprive the child of a substantial and positive emotional attachment so that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

Interactions between the natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, comfort, affection, and stimulation. The relationship arises from day-to-day interaction, companionship, and shared experiences. The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

The factors to consider when testing whether a parental relationship is important and beneficial include the age of the child, the portion of the child's life in the parent's custody, the positive or negative effect of interaction between the parent and child, and the child's particular needs. The relationship must be such that the child would suffer detriment from its termination. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.) Mother failed to show how Jonathan would suffer detriment from the termination of her parental rights.

Mother testified to doing “fun things” with Jonathan during supervised visits. The parent bears the burden of showing more than loving contact and pleasant visits. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954.) The parent has the burden of proving the statutory exception applies. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 646.) A biological parent who has failed to reunify with an adoptable child, as was the case here, may not derail adoption merely by showing the child would derive some benefit from continuing the parent-child relationship during periods of visitation. (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937.)

Mother needed to demonstrate she occupied a parental role in Jonathan’s life resulting in a significant, positive, emotional attachment from child to parent. (*In re Breanna S., supra*, 8 Cal.App.5th at p. 648.) Here, evidence of such a relationship was absent or inadequate. Before the current petition was filed, mother had left Jonathan with the maternal grandparents for a period of seven to eight months, while she attempted to achieve sobriety. Within a month of Jonathan being returned to her care, mother had begun using methamphetamine again. Mother told the social worker she used methamphetamine because of the “stress” of working full time and being a mother.

Jonathan had not spent any substantial time in mother’s care since he was three years old. While Jonathan was in mother’s custody, he was subjected to mother’s and father’s substance abuse and domestic violence. Counsel for Jonathan stated it best; during the time Jonathan lived with these parents, it was “chaotic, frightening, and scary” for the child. Here, the evidence mother occupied a crucial parental role in Jonathan’s life was inadequate. (*In re L.Y.L., supra*, 101 Cal.App.4th at p. 954.)

Mother failed to show detriment or harm if the parent-child relationship ended. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) Mother testified that she felt bonded with Jonathan and wanted to maintain a relationship with him. There was no evidence, however, that Jonathan was deeply bonded with mother and would suffer detriment if parental rights were terminated. The evidence established that Jonathan was thriving in

his placement with the maternal grandparents and exhibited a strong emotional attachment to his maternal grandparents.

Mother did not meet her burden of establishing that Jonathan would suffer great detriment, or any detriment, if her parental rights were terminated, such that it outweighed Jonathan's need for security and stability, which he had in the maternal grandparents' home. The juvenile court did not abuse its discretion in terminating parental rights and allowing Jonathan to be adopted by the maternal grandparents. (See *In re Celine R.*, *supra*, 31 Cal.4th at p. 53.)

Mother also argued that if father was successful in his appeal, that would be grounds for reversing mother's termination of parental rights so that Jonathan would maintain a relationship with both father and mother. However, we have rejected father's contention and therefore, reject this argument of mother's.

DISPOSITION

The order denying father's section 388 petition is affirmed. The order terminating mother's and father's parental rights to Jonathan and setting a permanent plan of adoption for Jonathan is affirmed.